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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL GUTIERREZ, Defendant and Appellant.	H033213 (Monterey County Super. Ct. No. SS062653)

I. STATEMENT OF THE CASE

After a court trial, the court found defendant Miguel Gutierrez guilty of two counts of committing lewd acts with a minor child who is 14 or 15 years old. (Pen. Code, § 288, subd. (c)(1).)[1] The court suspended imposition of sentence and placed defendant on probation for three years. As conditions of probation, the court imposed a 360-day jail term and required that he register as a sex offender. (§ 290.)

On appeal from the judgment, defendant claims the court erred in declining to consider his mistake-of-fact defense. He further claims the court erred in requiring that he register as a sex offender and comply with the residency restriction on sex offenders set forth in section 3003.5. He also claims the court's order requiring him to stay away

[1] All unspecified statutory references are to the Penal Code.

from the victim and her mother is unconstitutionally vague. Last, he claims the court imposed an unauthorized probation revocation restitution fine under section 1202.44.

We modify the stay-away probation condition, reduce the amount of the restitution fine, and affirm the judgment as modified.

II. FACTS[2]

Jane Doe was born on December 2, 1990, and lived with her mother. In March 2006, when she was 15 years old, Jane met defendant on an adult live chat line. He was 28. They started dating. Their relationship continued until September 2006 and included sexual intercourse and other sexual acts. Jane initially told defendant that she was 18 or 19 years old, but within a month after meeting him, she revealed her true age.

On September 6, 2006, Jane and defendant had an argument over a Nintendo DS that he had not returned to her. As a result, she called the police and accused defendant of raping and sodomizing her. However, the next day, she recanted. She told police that she falsely accused him because he would not return her Nintendo. She said that she and defendant had had consensual sex. Jane said defendant knew how old she was because her father once told him during a phone conversation.

The next day, defendant admitted to police that he and Jane regularly engaged in sexual intercourse when Jane's mother was gone. He also admitted that Jane had told him her true age. However, he claimed that she was laughing when she told him, and he thought she was joking. He thought she was 19, and it never crossed his mind that she was younger. Although she acted immature, he thought she had some mental problems. Defendant acknowledged having a conversation with Jane's father, who wondered why defendant had her phone number; but he denied learning about her true age from her father.

[2] Except for a stipulation concerning defendant's date of birth, the trial was based entirely on documentary evidence, including police reports, sexual assault response examination reports, defendant's interviews, and the transcript of the preliminary hearing.

Jane is 5 feet 10 inches tall and weighs 180 pounds. The nurse who examined Jane described her as a "tall, full-figured young woman." After interviewing Jane, the investigating officer opined that she had limited experience, she was obsessed with material things, and she was naïve about dating older men. Given her demeanor, manner of speaking, attitude, and conduct, the officer did not think that she was older than 15, even though she was wearing makeup during the interview.

III. MISTAKE OF FACT DEFENSE

Prior to trial, the court held a hearing on whether defendant could present evidence that he believed Jane was 19 years old and assert a mistake-of-fact defense to the charges.[3] The court concluded that a mistake of fact concerning the victim's age was not an available defense.

Defendant contends that the court's conclusion was wrong. We disagree.

In *People v. Hernandez* (1964) 61 Cal.2d 529 (*Hernandez*), the California Supreme Court held that a defendant's good faith, reasonable belief that his or her underage sex partner was 18 or older can be a defense to a charge of statutory rape under former section 261, subdivision (1), now section 261.5. (*Id*. at p. 536.)

Later, in *People v. Olsen* (1984) 36 Cal.3d 638 (*Olsen*), however, the court distinguished and limited *Hernandez*. In *Olsen*, the court considered whether a reasonable mistake concerning the age of a victim is a defense to a charge of committing lewd acts upon a child *under the age of 14 years* in violation of 288, subdivision (a). (*Id*.

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[3] Defendant was charged with violating section 288, subdivision (c)(1), which provides, "(c)(1) Any person who commits [any lewd or lascivious act] with the intent [of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child], and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child."

at p. 640.) In distinguishing *Hernandez*, the *Olsen* court explained, "There exists a strong public policy to protect children of tender years [that is, under 14 years of age] . . . . [S]ection 288 was enacted for that very purpose. [Citations.] Furthermore, even the *Hernandez* court recognized this important policy when it made clear that it did not contemplate applying the mistake of age defense in cases where the victim is of 'tender years.' " (*Id.* at p. 646.) The *Olsen* court cited a number of legislative provisions demonstrating "[t]ime and time again, the Legislature has recognized that persons under 14 years of age are in need of special protection. This is particularly evident from the provisions of section 26. That statute creates a rebuttable presumption that children under the age of 14 are incapable of knowing the wrongfulness of their actions and, therefore, are incapable of committing a crime. A fortiori, when the child is a victim, rather than an accused, similar 'special protection,' not given to older teenagers, should be afforded. By its very terms, section 288 furthers that goal." (*Id.* at pp. 647-648, fn. omitted.)

In *People v. Paz* (2000) 80 Cal.App.4th 293 (*Paz*), the court considered whether a reasonable mistake concerning the age of a victim is a defense to a charge of lewd or lascivious conduct with *a child of 14 or 15 years* in violation of section 288, subdivision (c)(1) (hereafter subdivision (c)(1)). There, the 28-year-old defendant was convicted of lewd conduct with a 14-year-old victim. (*Id*. at pp. 294-295.) On appeal, the defendant noted that the victim had admitted telling the defendant that she was 16 years old. He claimed the trial court erred in failing to instruct on his mistake-of-age defense. He argued that a 14- or 15-year-old victim does "not warrant the same public policy child protection given by the law to victims under the age of 14." (*Id*. at p. 295.)

Our colleagues at the Fifth District Court of Appeal disagreed. The court reviewed in detail the legislative history of subdivision (c)(1) and concluded that permitting a mistake-of-age defense "would undermine the purpose the Legislature

sought to achieve by enacting subdivision (c)." (*Paz*, *supra*, 80 Cal.App.4th at p. 295.) The court explained that the statute was enacted to fill a gap in the law and allow the imposition of felony punishment on offenders whose victims were 14 or 15 years old. However, to avoid criminalizing consensual sexual contact short of intercourse between consenting teenagers, the Legislature made subdivision (c)(1) applicable only if the perpetrator is at least 10 years older than the victim. (*Paz*, *supra*, 80 Cal.App.4th at pp. 296-297.) According to the court, the Legislature was "attuned to and took action to prevent" situations in which a " 'sexually naïve' " 14-or 15-year-old child could "fall victim to a more experienced adult." (*Id.* at p. 297.) Accordingly, the court found that subdivision (c)(1) reflects a "legislative desire to protect 14-and 15-year-olds from predatory older adults to the same extent children under 14 are protected by subdivision (a)[.]" (*Paz, supra*, 80 Cal.App.4th at p. 297.) In other words, "section 288 offenses set out a hierarchy of victims, from the most vulnerable—infants and children under subdivision (a)—to those perceived as less vulnerable—young teenagers under subdivision (c)(1). The age distinctions help define the gravity of, and the range of punishment for, the offense." (*Paz*, *supra*, 80 Cal.App.4th at p. 297, italics omitted.)

The court in *Paz* further noted that subdivision (c)(1) did not include a consent element. Moreover, the subdivision prescribes a lower range of prison terms than does subdivision (a), and, in appropriate cases, a violation of subdivision (c)(1) can be prosecuted as a misdemeanor, whereas a violation of subdivision (a) is always a felony.[4] (*Paz*, *supra*, 80 Cal.App.4th at p. 297.) The court observed that the Legislature's prescription of a lower range of prison terms and alternate misdemeanor punishment for a violation of the subdivision permits the trial court to "fashion a sentence consistent with the realities of the particular crime and discloses a legislative acknowledgement that

[4] Section 288, subdivision (a) prescribes prison terms of three, six or eight years; subdivision (c)(1) prescribes terms of one, two or three years in cases prosecuted as a felony.

some 14- and 15-year-olds may be more sexually sophisticated than others in those two age groups." (*Ibid.*) Moreover, the difference in the punishments indicates that the Legislature did not intend to allow a defense to a charge under subdivision (c)(1) based upon the perpetrator's misunderstanding of the victim's age. Rather, "if in a particular case there exist extenuating circumstances, such as a mistake about the victim's age, the statute allows for consideration of the factor for sentencing purposes. [Citation.]" (*Paz, supra,* 80 Cal.App.4th at p. 298, fn. omitted.)

Finally, the *Paz* court noted that the California Supreme Court's decision in *Olsen, supra,* 36 Cal.3d 638 that mistake of age is not a defense under section 288, subdivision (a), predated by four years the enactment of subdivision (c)(1). Thus, the Legislature was well aware of the holding in *Olsen* and could have included language permitting a mistake-of-age defense had it intended "to forbid application of the *Olsen* rationale to this later subdivision, a part of the same statute dealt with in *Olsen*." (*Paz, supra,* 80 Cal.App.4th at p. 298.) Indeed, the Legislature had previously done so in 1981, when it enacted section 1203.066, subdivision (a)(3), which provides that a defendant convicted under section 288 is not eligible for probation unless he or she had an honest and reasonable belief that the victim was 14 years or older. (*Paz, supra,* 80 Cal.App.4th at p. 298.) In *Olsen,* the court relied on that provision in rejecting a mistake-of-age defense under subdivision (a). (*Olsen, supra,* 36 Cal.3d at p. 647.) The *Paz* court also noted that other courts had declined to extend the holding in *Hernandez, supra,* 61 Cal.2d 529 to section 288 crimes. (*Paz, supra,* 80 Cal.App.4th at p. 300.)

In sum, the *Paz* court concluded, "At one time the Legislature decided that the age of 14 was the appropriate line of demarcation. After hearing the proposals and arguments in favor of and against the bill to add what ultimately became subdivision (c)(1) to section 288, the Legislature exercised its prerogative and elected to make potential felonies of lewd acts against 14-and 15-year-olds, just as such acts are felonies when

committed upon children 13 and under. We therefore believe the public policy rationale of *Olsen* for rejecting good faith mistake of age in section 288 cases involving victims under age 14 holds true for victims of ages 14 and 15 as well—'to protect children against harm from amoral and unscrupulous [adults] who prey on the innocent.' " (*Paz, supra,* 80 Cal.App.4th at p. 298.)

We agree with the analysis and holding in *Paz, supra,* 80 Cal.App.4th 293. The Legislature enacted subdivision (c)(1) to protect 14- and 15-year-old children from lewd conduct committed by adults who are substantially older than such children. Accordingly, we too conclude that absent an express statement by the Legislature to the contrary, mistake of age is not a defense to a charge of lewd conduct in violation of subsection (c)(1).

Defendant claims that *Paz* was wrongly decided. He argues that the *Paz* court erred in extending the holding of *Olsen* to 14- and 15-year-olds because the holding in *Olsen* was based on the fact that the victim was *under* 14, the public policy of protecting children under 14, and the historical basis for that policy. He also draws a different inference from the fact that *Olsen* predated the enactment of subdivision (c)(1). According to defendant, the lack of language prohibiting a mistake-of-fact defense indicates that the Legislature intended to allow it.

In *Olsen*, the court was concerned only with whether mistake of fact was a defense to a charge under section 288, subdivision (a). The court had no occasion to consider the legislative history of subdivision (c)(1) or whether the defense applied to a charge under that subdivision. Moreover, we find the *Paz* court's analysis of the legislative history and the statutory scheme in section 288 to be reasonable and persuasive.

Defendant alternatively argues that this case is distinguishable from *Paz*. There, the defendant could, at most, have mistakenly thought his victim was 16 years old. Because his act with a 16-year-old would still have been criminal, the court opined that

his conduct could not have been " 'morally innocent' " and, therefore, comparable to the conduct of the defendant in *Hernandez* who mistakenly thought he was having consensual intercourse with another adult. (*Paz, supra,* 80 Cal.App.4th at p. 300.)

Defendant argues that here, as in *Hernandez,* defendant mistakenly thought Jane was 18 or 19, which, if true, would have made his sexual conduct with her entirely innocent and legal. Thus, he claims he should have been permitted to raise a mistake of fact defense. We are not persuaded.

The discussion of "morally innocent" conduct in *Paz* was a response to *Staples v. United States* (1994) 511 U.S. 600 (*Staples*). There, the United States Supreme Court construed a federal statute prohibiting the possession of unregistered firearms to require proof of guilty knowledge. That construction was based in part on the court's concern that dispensing with a mens rea requirement "potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent." (*Id.* at pp. 614-615, fn. omitted.) As noted, the *Paz* court explained that a defendant's belief that his victim was 16 did not render his conduct entirely innocent. (*Paz, supra,* 80 Cal.App.4th at pp. 299-300.)

The *Paz* court's discussion of *Staples* does not reasonably represent a limitation on its analysis of the legislative history of subdivision (c)(1) or its view that the subdivision presents a clear mandate to protect sexually vulnerable 14-and 15-year-old children from predatory older adults or its conclusion that the Legislature did not intend to permit a mistake-of-age defense to charges under that subdivision. (*Paz, supra,* 80 Cal.App.4th at p. 298.) Indeed, in reaching its conclusion, the court did not rely on the fact that the victim pretended to be 16. Moreover, its discussion of "moral innocence" is in a separate section of the opinion that responded to and rejected defendant's reliance on *Staples, supra,* 511 U.S. 600. (*Id.* at pp. 298-300.)

In short, therefore, we conclude that the trial court did not err in declining to consider a defense based on mistake of fact concerning Jane's age.

IV. REGISTRATION AS A SEX OFFENDER

At sentencing, the court ordered defendant to register as a sex offender, finding that registration was mandatory under section 290.[5] However, the court further ruled that even if registration were discretionary, it would exercise its discretion to require registration based on clear evidence that defendant's sexual conduct involved oral and vaginal intercourse with the victim over a four- or five-month period, and his conduct was the result of "sexual compulsion and/or gratification." (See § 290.006.)

Citing *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), defendant contends that in finding him subject to the mandatory registration requirement, the trial court denied him equal protection under the law.

The Attorney General argues, in effect, that defendant's claim is irrelevant because the trial court alternatively and properly exercised its discretion and imposed the requirement based on factual findings of sexual compulsion and gratification.

Defendant acknowledges that the court exercised its discretion and does not claim that its factual findings are not supported by substantial evidence. Rather, defendant argues "the trial court's legal ruling precluding [him] from presenting a reasonable mistake of age defense at trial effectively prevented him from developing this evidence in the trial court. A remand for resentencing is required . . . to allow the court to hear additional testimony on this issue and thus to exercise its discretion in a fully informed manner."

We disagree that the court's pretrial ruling in any way foreclosed defendant from presenting evidence at sentencing that would have been relevant to a determination

[5] Section 290, subdivision (b) and (c) impose a lifetime duty to register on "[a]ny person who, since July 1, 1944, has been or is hereafter convicted in any court in this state . . . of a violation of . . . Section . . . 288." (§ 290, subd. (c).)

concerning whether to require registration. Notwithstanding the court's pretrial ruling, defendant retained the statutory right to present any mitigating evidence at sentencing. (§ 1204; *People v. Arbuckle* (1978) 22 Cal.3d 749, 753; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 725, overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1, 28; *People v. McGraw* (1981) 119 Cal.App.3d 582, 594, fn. 1.) Accordingly, we agree with the Attorney General that the court's discretionary ruling renders defendant's equal protection claim irrelevant.

In any event, we reject that claim on the merits.

In *Hofsheier*, *supra*, 37 Cal.4th 1185, a 22-year-old man was convicted of non-forcible oral copulation with a 16-year-old girl in violation of section 288a. He claimed that mandatory registration denied him equal protection because a similarly situated person convicted of nonforcible sexual intercourse, in violation of section 261.5, is not required to register. The California Supreme Court agreed, holding that "the statutory distinction in section 290 requiring mandatory lifetime registration of all persons, who, like defendant here, were convicted of voluntary oral copulation with a minor of the age of 16 or 17, but not of someone convicted of voluntary sexual intercourse [under section 261.5] with a minor of the same age, violates the equal protection clauses of the federal and state Constitutions." (*Id.* at p. 1207, fn. omitted.)

In *People v. Anderson* (2008) 168 Cal.App.4th 135 (*Anderson*), this court considered an equal protection claim identical to defendant's in this case. Indeed, defendant states that his claim is based on the same arguments raised by counsel in *Anderson*.

In *Anderson*, *supra*, 168 Cal.App.4th 135, we declined to extend *Hofsheier's* holding to persons like defendant here whose victims are 14 or 15 years old and who are at least 10 older than their victims, in violation of subdivision (c)(1). As we explained, "The holding in *Hofsheier* does not mandate a similar conclusion here. First, the

Supreme Court's holding was limited to mandatory sex offender registration for violating section 288a, subdivision (b)(1). The high court made it clear repeatedly in its opinion that its analysis was limited to an equal protection challenge involving mandatory registration for one convicted of voluntary oral copulation with a minor 16 or 17 years old (§ 288a, subd. (b)(1)), as compared with discretionary registration for one convicted of voluntary sexual intercourse with a 16- or 17-year-old minor (§ 261.5). [Citation.] [¶] [T]he high court made it plain that its equal protection analysis was concerned with circumstances in which the act (i.e., oral copulation with a minor, prohibited by section 288a, subd. (b)(1)) is both voluntary and the victim is 16 or 17 years old. As the court explained: 'In its present form, section 288a provides a graduated scale of punishment depending on the age of the parties and the presence or absence of force or other coercion . . . . Although section 288a[, subdivision] (b)(1) applies to all acts of oral copulation with a person under the age of 18, other provisions provide for greater punishment for involuntary acts and acts involving younger victims. Thus, section 288a, subdivision (b)(2), provides that a person over 21 years of age who engages in oral copulation with someone younger than 16 years of age is guilty of a felony, and subdivision (c)(1) provides for still greater punishment—three to eight years' imprisonment—for anyone who engages in oral copulation with someone under the age of 14 who is more than 10 years younger than the defendant. Other subdivisions specify imprisonment of three to eight years for forcible or involuntary oral copulation. (§ 288a, subds.(c)(2) & (3), (f).) And section 288 provides that any lewd or lascivious act (including oral copulation) with a child under the age of 14 is a felony punishable by three to eight years' imprisonment. Consequently, section 288a [, subdivision] (b)(1) functions as the primary offense (as opposed to being a lesser included offense) in only two instances: (1) when, as here, the act of oral copulation is voluntary and the victim is 16 or 17 years old; and (2) when the act is voluntary, the victim is 14 or 15 years old, and

the perpetrator is not over 21 years old. *We are concerned here with the validity of the mandatory registration requirement for the first category—voluntary acts of oral copulation when the victim is 16 or 17 years of age*.' (*Hofsheier*, *supra*, 37 Cal.4th at pp. 1194-1195 . . . , italics added.) [¶] In this instance, we are dealing with mandatory registration based on a conviction under section 288(c)(1), i.e., committing a lewd act on a child who is 14 or 15 years old where the perpetrator is at least 10 years older than that child. Not only does that particular provision contain specific protection for minors of an age group younger than the victim involved in *Hofsheier*, it also (unlike § 288a) contains a specific intent requirement. And, unlike Hofsheier, there is no relevant similarly situated group for which mandatory registration is not required that may serve as the basis for an equal protection challenge here. An adult who is at least 10 years older than the victim who commits a sex offense of oral copulation on a 14- or 15-year-old minor victim may be charged with a violation of [subdivision (c)(1)], just as defendant was charged in this case. Defendant's group, contrary to his argument here, is not similarly situated with those convicted of voluntary copulation of a 16- or 17-year-old victim in violation of section 288a, subdivision (b)(1). Defendant's equal protection challenge thus fails because he cannot establish that he, by virtue of his[subdivision (c)(1)] conviction and the mandatory registration resulting therefrom, is subjected to unequal treatment because there is a similarly situated group for which no such mandatory registration is a consequence of the sex offense conviction." (*Anderson*, *supra*, 168 Cal.App.4th at pp. 141-143; see *People v. Manchel* (2008) 163 Cal.App.4th 1108, disapproved on other grounds in *People v. Picklesimer* (2010) 48 Cal4th 330, 354, fn. 4 [concluding mandatory sex offender registration for oral copulation with a child under the age of 16 did not deny equal protection because defendant's conduct fell within subdivision (c)(1) and thus defendant would have to register regardless of the nature of his sexual conduct].)

More recently, this court reaffirmed *Anderson* and again rejected the same equal protection claim. (*People v. Cavallaro* (2009) 178 Cal.App.4th 103.)

Defendant offers no new or compelling argument to convince us that *Anderson* and *Cavallaro* are wrong or that mandatory registration denies him equal protection.

V. RESIDENCY RESTRICTION

Defendant contends that the residency restriction in section 3003.5, subdivision (b) cannot be applied to him.[6] He claims the restriction violates the constitutional guarantee of due process because it, in effect, banishes persons in certain communities from their homes and effectively curbs their ability to choose communities in which to live. Defendant further contends that imposition of the residency restriction violates the constitutional proscription against ex post facto laws because the sex offenses he committed that require registration were committed before section 3003.5 became effective.

Section 3003.5 was enacted by the electorate as part of Proposition 83, also known as the "Sexual Predator Punishment and Control Act" or "Jessica's Law," and became effective on November 8, 2006. (Prop. 83, § 21.) As noted, it prohibits those required to register as sex offenders from residing within 2,000 feet of any school or any "park where children regularly gather." (§ 3003.5, subd. (b).)

In their initial briefs, the parties acknowledged that the issues raised here were currently before the California Supreme Court. During the pendency of this appeal, the Supreme Court issued its opinion in *In re E.J.* (2010) 47 Cal.4th 1258 which addressed those issues. We requested further briefing concerning the effect of the decision in this case.

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[6] Section 3003.5, subdivision (b) provides, "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

In re E.J., supra, 47 Cal.4th 1258, the California Supreme Court held that issues concerning whether the residency requirement violates the due process rights of a parolee involve complex factual issues that can be resolved only after a particularized inquiry concerning the circumstances of a parolee by a trial court and not on a blanket basis by a reviewing court. (*Id*. at pp. 1280-1284.) The court further held that application of the residency restriction does not violate the proscription against ex post facto laws even if the sex offense that rendered a defendant subject to registration requirements and residency restrictions was committed before Jessica's Law became effective. (*Id*. at pp. 1279-1280.)

Given these holdings, defendant concedes, and the Attorney General agrees, that this court must reject defendant's ex post facto claim. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The parties also agree that since defendant is currently incarcerated and not on parole, his due process claim is premature and should be determined in the trial court if and when he is released on parole and if and when defendant elects to reassert it. Accordingly, we need not discuss these claims any further.

VI. STAY AWAY ORDER

At sentencing, as a condition of probation, the court ordered that defendant stay at least 100 yards away from "the victim and her mother, her residence, any vehicles, and their places of employment and/or school."

Defendant contends that, as articulated by the court, the probation condition is unconstitutionally vague because it does not contain a "knowledge requirement," that is it does not require that he know (1) the type of car Jane's mother drives, (2) where Jane's mother works, or (3) where Jane or her mother are at any given time so as to avoid being within 100 years of them.

Defendant acknowledges that he did not object to the condition, but he claims that he did not forfeit his claim and may raise it on appeal for the first time because it presents only a question of law based on undisputed facts.

The Attorney General agrees that defendant may raise the issue. We concur.

In *In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*), the Supreme Court resolved a conflict among appellate courts concerning whether the failure to raise a constitutional objection forfeits that claim on appeal. (*Id*. at pp. 879, 883-889.) In a word, the court's answer was *sometimes*. If the claim is based on alleged vagueness and overbreadth that can be corrected "without reference to the particular sentencing record developed in the trial court," the claim presents a pure question of law involving fundamental constitutional right, and the reviewing court may properly address it even if there was not objection below. (*Id*. at pp. 887.) In that case, the minor claimed for the first time on appeal that a probation condition prohibiting association with persons disapproved of by the probation department was unconstitutionally vague and overbroad because it did not require knowledge of who was disapproved. (*Sheena K., supra,* 40 Cal.4th at p. 878.) The appellate court not only addressed the issue but also agreed with the claim and then cured the constitutional defect. In affirming the judgment, the California Supreme Court opined that to resolve her claim, the appellate court did not have to review the facts and circumstances underlying the condition but needed only to consider abstract and generalized legal concepts—a task for which a reviewing court is well suited. (*Sheena K., supra,* 40 Cal.4th at p. 885.) Moreover, the court observed that "[c]onsideration and possible modification of a challenged condition of probation, undertaken by the appellate court, may save the time and government resources that otherwise would be expended in attempting to enforce a condition that is invalid as a matter of law." (*Id*. at p. 885.)

Defendant's claim here is essentially the same as that raised in *Sheena K.*

In light of the California Supreme Court's discussion in *Sheena K.*, the Attorney General further agrees that the probation condition is defective because it does not require that defendant know essential facts that would provide notice that certain conduct would constitute a probation violation. Moreover, "[s]ince 'fair notice' is not possible unless a probation condition precluding association includes a knowledge requirement [citation], [the Attorney General] agrees the condition should be modified." The Attorney General accepts defendant's proposal to modify the condition to provide as follows: "The defendant shall not knowingly contact or come within 100 yards of the victim and her mother, and any place, residence, business, school, or vehicle he knows to be associated with them."

We agree with the parties that the probation condition must be modified to pass constitutional muster and accept the parties' proposed modification. (See, e.g., *In re H.C.* (2009) 175 Cal.App.4th 1067, 1072-1073 [modifying probation condition to include knowledge requirement]; *People v. Turner* (2007) 155 Cal.App.4th 1432, 1436 [same].)

VII. RESTITUTION FINE

At sentencing, the court adopted the recommendation in the probation report and imposed "a fine of $1340.00 pursuant to Penal Code section 290.3" which included a "$200 State Restitution Fine." The court likewise adopted another recommendation in the report and, under section 1202.44, imposed "[a]n additional restitution fine in the amount of $400.00 (same as that assessed pursuant to [§] 1202.4(b))" but suspended it and ultimately eliminated it unless probation is revoked and not reinstated.

Defendant contends that the section 1202.44 fine of $400 is unauthorized by law and must be reduced to $200. We agree.

Section 1202.44 provides, in relevant part, that when a person is convicted and the court grants probation, "the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional probation revocation

restitution fine *in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.*" (Italics added.)

Under section 1202.4, subdivision (b), the trial court must impose a restitution fine "unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (§ 1202.4, subd. (b).) Here, the court did not state any reasons for not imposing a fine or suggest that it was not doing so. Moreover, the record, as summarized above, reasonably indicates to us that the court did impose a fine in the amount of $200, as recommended in the probation report. We reject the Attorney General's view that the record is unclear on this point. Therefore, we agree with defendant that the $400 section 1202.44 fine is unauthorized because it exceeds the amount of the section 1202.4 fine. Accordingly, we shall reduce that fine to $200.

VIII. DISPOSITION

We modify the stay-away probation condition to read as follows:

The defendant shall not knowingly contact or come within 100 yards of the victim and her mother, and any place, residence, business, school, or vehicle he knows to be associated with them.

We also reduce the probation revocation restitution fine imposed under section 1202.44 to $200.

As modified, the judgment is affirmed. The Clerk of the Monterey County Superior Court is directed to prepare an amended abstract of judgment and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

_____
RUSHING, P.J.

WE CONCUR:

_____
ELIA, J.

_____
DUFFY, J.

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